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# **ASH PETITIONS AGAINST OSHA RELATED TO ETS IN THE WORKPLACE**

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*A Current Reference Document*

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Supplementing the Reports on Recent  
ETS and IAQ Developments

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Action on Smoking and Health (ASH) has filed six actions in court against OSHA, challenging the agency's refusals to regulate ETS in the workplace according to ASH's demands. ASH's requests for relief have been denied in court five times. The sixth petition for review, filed in December 1995, is pending.

## **I. *ASH V. OSHA I AND ITS BACKGROUND***

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In 1985 four men -- David Hughes Horne, a chemical engineer; Robert Hughes Horne, M.D.; Jonathon Hughes Horne, M.D.; and Cloyd R. Chamberlain, D.D.S., acting through Senator Jake Garn -- submitted a petition to OSHA concerning smoking in the workplace. The petition focused on the petitioners' belief that tobacco smoke should be classified as a Category One potential occupational carcinogen. OSHA replied in November 1985, denying the petition due to changes in the agency's carcinogen policy, as set forth in the U.S. Supreme Court ruling, *IUD v. API*, 448 U.S. 607 (1980). Then, in 1986, David Horne petitioned OSHA through his congressman, David Monson, for an emergency temporary standard governing smoking in the workplace. That petition was denied by the agency in February 1987 due to the lack of data demonstrating a "grave danger" to workers from passive tobacco smoke, as defined in the OSH Act.

On May 6, 1987, the Public Citizen Help Research Group and the American Public Health Association submitted a petition to OSHA for an emergency temporary standard to prohibit smoking in all indoor workplaces except for certain specified areas. On May 19, 1987, ASH submitted a petition to OSHA in support of banning smoking in "common workplace areas . . . , but suggested less severe restrictions temporarily while a standard is developed."

In response to these petitions, OSHA arranged to have an independent contractor, Meridian Research of Silver Spring, Maryland, review the health effects studies cited by petitioners. The four reports considered were as follows: "Passive Smoking In The Workplace" issued in May 1986 by the Office of Technology Assessment; "The Health Consequences Of Involuntary Smoking" issued in 1986 by the U.S. Surgeon General; the 1985 article from *Environment International* written by J.L. Repace and A.H. Lowrey titled "A Quantitative Estimate Of Non-Smokers Lung Cancer Risk From Passive Smoking"; and "Environmental Tobacco Smoke: Measuring Exposures And Health Effects" issued in 1986 by the National Research Council.

On March 24, 1988, Meridian issued its report, "Review Of Four Studies Estimating The Risk Of Exposure to Environmental Smoke." The Meridian report concluded that these four reports relied heavily on the same case-control studies.<sup>1</sup> The report criticized

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1. These studies were as follows: (1) Trichopoulos, et al. (1981); (2) Correa et al. (1983); (3) Chan and Fung (1982); (4) Koo et al. (1984); (5) Kabat and Wynder (1984); (6) Garfinkel et al. (1981, 1985).

these studies, stating that all were based primarily on the risk associated with residential rather than occupational ETS exposure. The report concluded that there is a "need to resolve these issues by collecting data by means of personal sampling to ascertain the relative contribution of workplace exposure to a nonsmoker's overall exposure to environmental tobacco smoke from all sources."

OSHA determined, based in part on the Meridian Research report, that available data did not demonstrate the existence of a "grave danger" due to workplace exposure to ETS, as defined in 29 U.S.C. § 655(c) of the OSH Act. On July 6, 1989, ASH filed a complaint with the U.S. District Court for the District of Columbia to compel OSHA to respond to ASH's 1987 petition. This complaint was voluntarily dismissed when OSHA denied the petition for an emergency temporary standard to prohibit indoor smoking in the workplace on September 1, 1989.

On October 27, 1989, ASH filed a petition with the U.S. Court of Appeals in the District of Columbia for a review under 29 U.S.C. § 655(f) of OSHA's determination not to issue an emergency temporary standard and for an order pursuant to 5 U.S.C. § 706 to set aside such determination as arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. On July 18, 1990, the court granted the parties' joint motion to hold the proceedings in abeyance until November 30, 1990, while OSHA considered whether to take regulatory action relating to ETS.

On November 30, 1990, OSHA wrote ASH, stating that "OSHA was not prepared, at the present time, to initiate rule making on ETS, although a final decision whether, and how, to proceed has not been reached." The letter further stated that OSHA was waiting for the EPA's draft assessment of the adult lung cancer risk of ETS. Then, on December 14, 1990, OSHA filed its status report with the court, stating that the agency intended to issue a request for information (the first step in the process of evaluating workplace air quality, including ETS, and determining whether the agency should promulgate a standard) in spring 1991.

The court subsequently denied ASH's petition in May 1991, stating, "We believe that the OSHA reasonably determined that it could not at this time sufficiently quantify the degree of risk associated with workplace exposure to ambient tobacco smoke to justify issuing an ETS [emergency temporary standard]."

## **II. OTHER PETITIONS FOR REVIEW FILED BY ASH WITH THE U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA; *ASH V. OSHA* II, III, IV, and V**

As a result of two statements made by OSHA in late 1990, ASH filed two petitions for review with the U.S. Court of Appeals for the District of Columbia in early 1991.

The first of these petitions related to OSHA's November 30, 1990, letter to ASH, which stated that the agency is "not prepared, at the present time, to initiate rule making on ETS, although a final decision whether, and how, to proceed has not been reached." The letter further stated that when OSHA "proposed its November 30 time frame, it expected to have the benefit of EPA's consideration of a draft assessment of the adult lung cancer risk of ETS. The EPA risk assessment document and the comments of the EPA's Science Advisory Board could influence the structure and content of any OSHA regulatory initiative in this area." In response to this letter, ASH filed a petition for review on January 23, 1991. The petition alleged that OSHA's determination was invalid because it was unsupported by substantial evidence in the record considered as a whole and constituted agency action unlawfully withheld or unreasonably delayed.

The second petition for review (also filed on January 23, 1991) was based on the December 14, 1990, status report OSHA filed with the court. This report stated that OSHA intended to issue a request for information in spring 1991. ASH's petition alleged that this decision was "invalid as [it was] unsupported by substantial evidence in the record considered as a whole"; constituted "agency action unlawfully withheld or unreasonably delayed"; and was "arbitrary, capricious, and an abuse of discretion, or otherwise not in accordance with the law."

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The court of appeals denied the relief requested in both petitions in January 1992, finding that ASH had sought review of nonfinal agency orders, and that OSHA's delay was not so egregious as to warrant an extraordinary remedy.

On December 22, 1992, ASH filed a fourth petition for review in the U.S. Court of Appeals in the District of Columbia. Based on OSHA's alleged refusal (i) to regulate ETS as a potential occupational carcinogen pursuant to OSHA's Cancer Policy, 29 C.F.R. §§ 1990.101 -.152, and (ii) to consider initiating rulemaking proceedings with regard to ETS as separate from indoor air quality (IAQ),<sup>2</sup> the petition sought an order that these determinations be set aside "as arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." ASH also averred that OSHA unreasonably delayed making a decision regarding whether and how to regulate ETS in the workplace. One of the allegations of harm concerned OSHA's purported lack of compliance with "its representation to this Court in Cases No. 91-1037 and 91-1038 that it would make a determination whether and how to regulate ETS in the workplace as soon as possible after analyzing the comments to its September 20, 1991, Request for Information on Occupational Exposure to Indoor Air Pollutants."

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2. The Petition for Review contains an exhibit purporting to be a letter dated October 30, 1992, from Dorothy Strunk, acting assistant secretary of OSHA, in which she thanked ASH for its July 31, 1992, petition requesting the regulation of ETS. Strunk noted that OSHA's Cancer Policy does not require OSHA to propose regulation, and that OSHA was already examining data on ETS as part of its larger project involving IAQ. The letter concluded, "We believe, at this point in the project, nothing is to be gained either in the effectiveness or the expedition of the rulemaking, by separating out the issue of tobacco smoke from indoor air quality issues. The information that you submitted along with your petition has been included in the docket."

ASH claimed that the OSHA Cancer Policy requires a scientific evaluation of the carcinogenicity of ETS and the issuance of a standard regulating ETS as a potential occupational carcinogen. ASH summarily referred to the research and findings on ETS by "numerous members of the scientific and medical community," including the EPA,<sup>3</sup> and suggested that OSHA's refusal to initiate a separate ETS rulemaking proceeding was unsupported in light of evidence that had been available to OSHA at least since 1986. ASH also enumerated the petitions and court actions it had taken in the preceding five years to bring to the attention of OSHA the information OSHA allegedly needed to issue a standard regulating ETS as a potential occupational carcinogen.

On July 12, 1994, the court of appeals dismissed this petition without prejudice. The court determined (i) ASH's claim that OSHA unreasonably delayed rulemaking on ETS was mooted by the Notice of Proposed Rulemaking on Indoor Air Quality Contaminants issued by OSHA on April 15, 1994; (ii) ASH's claim of future unreasonable delay due to OSHA's treatment of ETS within the context of an omnibus IAQ rulemaking was not yet ripe for judicial review; and (iii) ASH's challenge to the "omnibus nature of OSHA's proposed rulemaking" would not be considered on the merits because "final agency action is lacking."

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3. Although the EPA had not yet issued its final report classifying ETS as a Group A (known human) carcinogen, ASH reviewed the EPA draft risk assessments on ETS and accurately predicted that the final report would not change this designation.

Although the court specifically found that there was no unreasonable delay on the facts before it, the court stated that "we are mindful of OSHA's prolonged delay in regulating ETS" and cautioned that ASH "may renew its petition if OSHA fails to pursue its rulemaking with due dispatch."

There was a detailed discussion of the timetable for rulemaking under the OSHA Cancer Policy, but the court did not state whether a rulemaking on ETS must conform to the cancer policy. The court noted that there is a conflict between the cancer policy and the designated comment period for the proposed rulemaking, but declined to address the issue because ASH did not raise this claim in its petition for review.

On August 11, 1994, ASH filed its fifth petition for review in the U.S. Court of Appeals for the District of Columbia. This petition asked the court to set aside OSHA's postponement of the commencement of its indoor air quality rulemaking hearings (from July to September 1994) and OSHA's refusal to commence a separate rulemaking for ETS. Again, ASH sought an order that OSHA comply with its cancer policy criteria and procedures in regulating workplace ETS and requested that the court establish "a specific timetable for OSHA to comply with in regulating ETS in the workplace."

ASH claimed it had been harmed "because OSHA has not complied with its representations to this Court in Cases Nos. 92-1661, 91-1037 and 91-1038 that it would make

a determination whether and how to regulate ETS in the workplace as soon as possible and in compliance with its procedural deadlines."

The court of appeals dismissed this petition on November 22, 1994, as "not ripe for judicial review." According to the per curiam order of the court, "Because OSHA could still issue its final rule within 120 days from the conclusion of the hearing, we cannot say that OSHA's rulemaking will, in all likelihood extend beyond the schedule set forth in the Cancer Policy." The court further stated, "Because no legal consequences attach to OSHA's inclusion of environmental tobacco smoke in the proposed omnibus rulemaking, it is premature for us to consider ASH's challenge to the nature of OSHA's proposed rulemaking."

### **III. SIXTH ASH PETITION**

On December 22, 1995, Action on Smoking and Health (ASH) filed its sixth petition against OSHA in the D.C. Circuit Court of Appeals seeking to force OSHA to issue a workplace standard on ETS. ASH "seeks review of OSHA's determination to deliberately violate its own cancer policy time period deadlines by not deciding whether to issue a standard regulating environmental tobacco smoke (ETS) as a potential occupational carcinogen by November 11, 1995, and by instead extending the time period for comments beyond that provided by the cancer policy which this Court has recognized controls."

ASH also seeks (i) "review of the agency's decision, in direct violation of its cancer policy, not to consider the regulation of a potential occupational carcinogen (ETS) in a separate proceeding...."; (ii) review of the agency's decision "to permit even into the portion of the rulemaking proceeding related to environmental tobacco smoke (ETS) vast amounts of extraneous materials specifically precluded from admission under its own cancer policy, with resulting delay both now and in the future"; and (iii) an order that OSHA's determination not to issue an ETS standard in a timely manner should be set aside "as arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law."

Indicating that it will provide further grounds for review in a brief, ASH argues in its petition that the feasibility of a workplace smoking regulation has been shown by "the five states which have already successfully regulated smoking in the workplace -- California, Utah, Vermont, Maryland, and Washington state." ASH also argues that "OSHA's determinations are not supported by substantial evidence in the record considered as a whole" and that OSHA was required by its cancer policy to issue a final decision within 120 days from the last day of any hearing. According to ASH, "that date was on or about July 11, 1995, a date which has long since passed." A permissible extended time limit, argues ASH, "would require a final decision on or about November 11, 1995."

Attached to the petition are Administrative Judge John Vittone's October 1995 order extending the post-hearing comment period to January 16, 1996, and two decisions of the

court of appeals dismissing prior ASH petitions. ASH specifically requests that the court set aside OSHA's refusal to issue a timely ETS standard remand the matter for OSHA to issue an ETS standard "under the criteria, procedures and time limits contained in OSHA's Cancer Policy, or as soon thereafter as possible," and grant further relief at the court's discretion, "including attorney's fees and costs." Also filed with the petition was a motion to expedite review.

#### IV. CHRONOLOGY

The following chronology summarizes ASH activity against OSHA during the last nine years.

**1987** -- ASH petitions OSHA for an emergency temporary standard to ban smoking in common workplace areas.

**1988** -- OSHA requests an independent contractor to review the evidence on ETS exposure submitted in petitions filed by ASH, the Public Citizen Health Research Group, the American Public Health Association, and two members of Congress acting on behalf of a man named David Horne. The contractor criticizes the evidence as being based primarily on residential exposure.

1989 -- ASH files a complaint in U.S. district court seeking an order to compel agency action on its 1987 petition. OSHA denies petition for temporary standard. ASH dismisses its complaint and files a petition with the court of appeals for review of OSHA's determination not to issue an emergency temporary standard.

1990 -- ASH and OSHA agree to hold proceedings in abeyance until OSHA considers whether to take action on ETS. In November, OSHA states it is awaiting the release of a final EPA risk assessment on ETS. In December, OSHA declares its intent to issue a request for information on indoor air, including ETS, in spring 1991.

1991 -- ASH files its second and third petitions for review with the court of appeals. In May, the court of appeals denies ASH's first petition for review, which was filed in 1989. In September, OSHA issues its request for information on indoor air, including ETS.

1992 -- Court of Appeals denies ASH's second and third petitions for review. In February, March and July, ASH files rulemaking petitions with OSHA seeking regulation of workplace smoking. In addition, ASH files a petition in July requesting that OSHA initiate a rulemaking under its cancer policy to either ban smoking in all indoor workplaces or restrict smoking to separate areas with independent ventilation. In October, OSHA responds to the July petition, stating it is reviewing materials from the

request for information and does not believe a separate rulemaking is necessary. In December, ASH files a fourth petition for review with the court of appeals, seeking review of the October letter.

**1993** -- EPA issues its final risk assessment on ETS, and outgoing Secretary of Labor Lynn Martin issues a memorandum to OSHA directing the agency to commence rulemaking for ETS separate from IAQ "as soon as possible." In May, the court of appeals denies OSHA's motion to dismiss ASH's petition for review filed in December 1992.

**1994** -- On April 5, OSHA publishes notice of proposed rulemaking on IAQ and smoking in the workplace. In July, the court of appeals dismisses ASH's fourth petition for review without prejudice. In August, ASH files its fifth petition for review against OSHA, asking the court to set aside OSHA's postponement of the commencement of its IAQ rulemaking hearings (from July to September 1994) and its refusal to commence a separate rulemaking for ETS. In November, the court of appeals dismisses the petition as not ripe for judicial review.

**1995** -- OSHA concludes its rulemaking hearing on March 13, 1995. Judge Vittone extends the post-hearing comment period to January 16, 1996. ASH files its sixth petition for review against OSHA, arguing that the delay violates the OSHA Cancer Policy.